

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
NORTHERN DIVISION

NO. 2:19-CR-12-FL

UNITED STATES OF AMERICA

v.

CAPT. NEILL'S SEAFOOD, INC.

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)

CAPT. CHARLIE'S SEAFOOD
CORPORATE RESOLUTION

**JOINT WRITTEN CONSENT TO ACTION WITHOUT MEETING
OF
THE SOLE SHAREHOLDER AND DIRECTOR
OF
CAPT. CHARLIE'S SEAFOOD, INC.
TO
APPROVE GUARANTY**

June 21,
May __, 2019

The undersigned, being the sole member of the board of directors of Capt. Charlie's Seafood, Inc., a North Carolina Corporation (the "Board") (the "Company") and the sole holder of all of the issued and outstanding capital stock of the Company (the "Sole Shareholder"), acting pursuant to Sections 55-7-04 and 55-8-21 of the North Carolina General Statutes, hereby adopt the following resolutions by signing their written consents hereto in lieu of a meeting, and hereby direct that this written consent be filed with the minutes of the proceedings of the Board and of the Sole Shareholder of the Corporation:

WHEREAS, the Corporation has been engaged in discussions with the United States Attorney for the Eastern District of North Carolina (the "US Attorney") regarding serving as a guarantor of the account of Capt. Neill's Seafood, Inc., a North Carolina corporation ("Captain Neill's") and Phillip Carawan (each an "Obligor" and collectively the "Obligors") for the benefit of the Government Beneficiary as identified in the Guaranty Agreement attached hereto as Attachment A, which has been reviewed by the Board; and

WHEREAS, in order to resolve such discussions with the US Attorney, and to assist the Corporation's sister company, Captain Neill's, the US Attorney has proposed that the Corporation execute the Guaranty Agreement in favor of the Government Beneficiary; and

WHEREAS, after consultation with its legal counsel, the Board and Sole Shareholder find it to be in the best interests of the Corporation to resolve the matters with the US Attorney and to assist Captain Neill's and Phillip Carawan.

NOW, THEREFORE, BE IT RESOLVED, that Phillip R. Carawan, the President of the Corporation, and Tara Foreman be and they hereby are, appointed as the Corporation's joint and duly authorized representatives and agents-in-fact (the "Agents-in-Fact") with full power and authority to do all things necessary on behalf of the Corporation to resolve the matters with the US Attorney, including but not limited to executing the Guaranty Agreement; and be it

FURTHER RESOLVED, that the Guaranty Agreement be, and it hereby is, approved and adopted in all respects in substantially the form as set forth in Attachment A; that any ancillary documents and agreements that are contemplated by the Guaranty Agreement in connection with resolving the matters with the US Attorney be, and they hereby are, approved and adopted in all respects and that all of the transactions related to the resolution of such matters be, and they hereby are, approved and adopted in all respects; and be it


FURTHER RESOLVED, that the Agents-in-Fact be, and hereby are, authorized and directed, in the name and on behalf of the Corporation, to execute the Guaranty Agreement and any ancillary documents and agreements that are contemplated by the Guaranty Agreement, with such modifications as the Agents-in-Fact shall approve, and to deliver the same to the US Attorney, such execution and delivery conclusively to evidence the due authorization and approval thereof by the Corporation; and be it

FINALLY RESOLVED, that any actions taken by the Agents-in-Fact and any officers, attorneys or agents of the Corporation prior to the date of this written consent that are within the authority conferred hereby are hereby ratified, confirmed and approved in all respects as the acts and deeds of the Corporation.

[Signature page follows]

IN WITNESS WHEREOF, the undersigned member of the Board and Sole Shareholder of the Corporation have caused this Joint Written Consent to Action Without Meeting to be executed as of the day and year first above written.

DIRECTOR:


Phillip R. Carawan

SOLE SHAREHOLDER:


Phillip R. Carawan

Attachment A

GUARANTY AGREEMENT

THIS GUARANTY AGREEMENT (this "Guaranty"), dated as of INSERT DATE, is issued and delivered by Capt. Charlie's Seafood, Inc., a North Carolina corporation (the "Guarantor"), by and through its President, Phillip R. Carawan and its officer/employee, Tara Foreman, for the account of Capt. Neill's Seafood, Inc., a North Carolina corporation and Phillip R. Carawan, a resident of North Carolina (each individually and collectively, the "Obligor" or "Obligors"), and for the benefit of the United States of America, by and through the United States Attorney's Office for the Eastern District of North Carolina and Environmental Crimes Section of the United States Department of Justice, and all other payees described under the Plea Agreements (as defined below) (collectively referred to herein as the "Government Beneficiary") (Guarantor, Obligors, and Government Beneficiary collectively referred to herein as the "Parties").

Background Statement

WHEREAS the Government Beneficiary and each Obligor, Phillip R. Carawan and Capt. Neill's Seafood, have entered into a Memorandum of Plea Agreement dated as of INSERT DATE (the "Plea Agreements"), attached as Exhibits A and B and incorporated by reference herein, wherein these Obligors promise to make certain payments and perform certain obligations;

WHEREAS the Government Beneficiary has required that the Guarantor deliver to the Government Beneficiary this Guaranty as an inducement for the Government Beneficiary to enter into the Plea Agreements with the Obligors;

WHEREAS the Guarantor is a sister company of Capt. Neill's Seafood and that Phillip R. Carawan is the President of the Guarantor;

WHEREAS Tara Foreman is an employee of Capt. Charlie's Seafood, Inc., and is anticipated to continue in that capacity or as an officer, operator, and/or manager of Capt. Charlie's Seafood, Inc., and as such, will be in a position to ensure the Guarantor's compliance with the terms of this Guaranty;

WHEREAS the Guarantor benefited from the criminal conduct of Capt. Neill's Seafood, Inc. and Phillip R. Carawan;

WHEREAS the Guarantor, in its capacity as the sister company for Capt. Neill's Seafood agrees to guarantee those payments and those certain performance obligations as set forth in this Guaranty and the Plea Agreements; and

WHEREAS, and except as provided otherwise herein, the Parties to this Guaranty understand and agree that the obligations that are the subject of this Guaranty are the primary obligations of the Obligors and that, absent the Obligors' failure to pay or failure to perform, the Guarantor has no obligation or duty to pay or perform.

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Guaranty

NOW, **THEREFORE**, in consideration of the foregoing and for good and valuable consideration, the Guarantor hereby agrees as follows:

1. **Payment Guaranty.** The Guarantor absolutely and unconditionally guarantees the timely payment of those payment obligations of the Obligors under the Plea Agreements as follows: the payment of criminal fines, restitution, and special assessments (hereinafter referred to collectively as "criminal monetary penalties).

2. **Performance Guaranty.** The Guarantor guarantees the Obligors' performance of the following terms of the Plea Agreements, as more fully described in the Plea Agreements:

- The Guarantor shall guarantee performance of the obligations of the Obligors under the Environmental Compliance Plan as more fully described Plea Agreements.
- The Guarantor's obligation in the event of a failure to perform by any of the Obligors may be fulfilled by providing payment for the amounts owed, by retaining a qualified third party to perform such obligation and providing payment of the performance of such obligation, and/or otherwise by causing performance of such obligation as more fully described herein at Paragraph 17, "**Demand for Payment or Performance: Resolution of Disputes.**"

3. **Nature of Payment Guaranty.** The Guaranty set forth in Paragraph 1 of this Guaranty constitutes a guaranty of payment by Guarantor of the full amount, including interest, owed by the Obligor for the criminal fines, restitution, and special assessments, as set forth in the Plea Agreements and the related Judgments to be entered (the "Plea Agreements Amount"), and shall not be affected by any event, occurrence or circumstance which might otherwise constitute a legal or equitable discharge or defense of a guarantor or surety (other than full and complete payment of the Plea Agreements Amount and the related Judgments to be entered). In the event that any payment by Obligors pursuant to the Plea Agreements and the related Judgments to be entered is rescinded or must otherwise be returned by virtue of any action by any bankruptcy court, the Guarantor shall remain liable hereunder with respect to such Plea Agreements Amount as if payment had not been made. The Guarantor agrees that the Government Beneficiary may resort to Guarantor for payment of any of the Plea Agreements Amount, without regard to whether the Government Beneficiary shall have proceeded against any other person or entity primarily or secondarily obligated with respect to any of the Plea Agreements Amount.

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4. Consent Judgment. Guarantor agrees to the consent judgment attached as Exhibit C ("Consent Judgment"). Guarantor further agrees that immediately upon Obligor's failure to make any payment of the Plea Agreement Amounts, the Government Beneficiary may immediately file a civil complaint to enforce the terms of this Guaranty, and may immediately move for entry of the Consent Judgment. Guarantor agrees not to contest the complaint or entry of the Consent Judgment in any way, except as provided in Paragraph 17, below. Guarantor agrees that upon entry of the Consent Judgment, the Government Beneficiary is entitled to take any and all collection action permitted by law against Obligor and Guarantor, including but not limited to garnishments, executions, and offsets.

5. Effect of Amendments. If the United States District Court for the Eastern District of North Carolina amends any term of the Plea Agreements (including but not limited to the Environmental Compliance Plans or "ECPs") or related Judgments, and that amendment in any way affects the Guaranteed Obligations, the Parties agree as follows:

- If the Obligor consents to the change, the Guarantor shall remain bound to perform the Guaranteed Obligations, as described in any amended Plea Agreements, Judgments or amended compliance plan(s), and the Guarantor shall not be entitled to any notice of such amendment or to further assent to such amendment.
- If any of the Obligor concludes that the amendment is a material change and objects to the change, the Parties agree that the Obligor shall provide notice, in writing and served upon the Obligor and counsel for the Obligor, of the change to the Guarantor and that the Guarantor shall have a right to either object or assent to the change within ten (10) days of such notice. Such objection or assent shall be in writing and provided to the Government Beneficiary and the Court prior to any hearing or proceeding on the proposed change.
- If, after receipt of notice of the alleged material change as set forth above, the Guarantor assents to the change, the Guarantor shall remain bound to perform the Guaranteed Obligations as amended.
- If the Guarantor objects, the Guarantor shall be permitted to participate in any hearing or proceeding on the proposed amendment. The Guarantor, however, will only be able to object to the financial burden of the amendment (either in terms of fine or performance), and not whether the amendment is warranted or reasonable, a decision committed to the discretion of the District Court. If the Court concludes that the financial burden of the amendment is not material, the Guarantor shall remain bound to perform the Guaranteed Obligations, as described in any amended Plea Agreements, Judgments or amended compliance plan(s). If

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the Court concludes that the increased financial burden is in fact material, the Guarantor shall not be bound to perform the portion of the amended obligation(s) that exceeds the original Guaranteed Obligations. The Guarantor shall remain bound to perform all other Guaranteed Obligations.

6. Limitation. Notwithstanding any other provision in this Guaranty, the Parties agree that the Guarantor guarantees payment and/or performance to the same extent that such payment and/or performance would be required of each Obligor pursuant to the Plea Agreements and that the Guarantor reserves any defenses that the Obligor could invoke pursuant to the Plea Agreements. The Parties further agree that, notwithstanding any other provision in this Guaranty, the Guarantor shall not be liable for consequential damages or indirect loss.

7. Acceleration. The Guarantor agrees that, within ten (10) days of receipt of written notice from the Government Beneficiary that the Obligor has failed to make any payment of the Plea Agreement Amounts, the Guarantor will be obligated to pay in full the Plea Agreement Amounts then due. The Guarantor understands that the failure to adhere fully to the terms of this paragraph would be a material breach of this Guaranty Agreement. In the event of a default in payment of the Plea Agreement Amounts, interest will accrue on the unpaid balance at a rate of 2.75 percent per annum compounded daily from the date of default on the remaining unpaid total (principal and interest balance).

8. No Waiver; Cumulative Rights. No failure on the part of the Government Beneficiary to exercise, and no delay in exercising, any right, remedy or power hereunder shall operate as a waiver thereof, nor shall any single or partial exercise by the Government Beneficiary of any right, remedy or power hereunder preclude any other or future exercise of any right, remedy or power. Each and every right, remedy and power hereby granted to the Government Beneficiary or allowed by law or other agreement shall be cumulative and not exclusive of any other, and may be exercised by the Government Beneficiary from time to time.

9. Effective Date. This Guaranty shall become effective on the date the Judgments against the Obligors are entered. It shall be the responsibility of counsel for Capt. Neill's Seafood, Inc. to provide a copy of such Judgments to the Registered agent of the Guarantor.

10. Subrogation. The Guarantor shall not exercise any subrogation rights it may acquire against each Obligor as a result of this Guaranty until all of the criminal monetary penalties have been paid in full to the Government Beneficiary. The Parties agree, however, that nothing in this Guaranty shall prevent the Guarantor from bringing any claims or exercising any rights or

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remedies against the Obligor, provided that the Guarantor shall meet all obligations to the Government Beneficiary under this Guaranty regardless of any claims, rights, or remedies that the Guarantor may have against the Obligor.

11. Severability. Should any one or more provisions of this Guaranty be determined to be illegal, unenforceable, void or voidable, all other provisions shall remain in effect.

12. Miscellaneous. Each signatory hereto represents and warrants that he or she is authorized to execute and deliver this Guaranty on behalf of the Party for whom he or she is purporting to act. This Guaranty may be executed in counterparts, each of which shall constitute an original and all of which shall constitute one and the same Guaranty.

13. Board Resolution. The Guarantor shall provide the Government Beneficiary a certified copy of a resolution of the Guarantor's Board of Directors affirming that the Guarantor has authority to enter into this Guaranty and that the Guarantor's Board of Directors has: (1) reviewed this Guaranty, the Plea Agreements and the Consent Judgment; (2) consulted with legal counsel in connection with this matter; (3) voted to authorize Guarantor to enter into this Guaranty; and (4) voted to authorize the corporate officer(s) identified below to execute this Guaranty and to take such further steps as necessary to carry out its terms. A copy of such resolution shall be attached to this Guaranty as Exhibit D.

14. Waiver of Rights. The Guarantor expressly waives (i) protest, (ii) notice of acceptance of this Guaranty by the Government Beneficiary, (iii) presentment, (iv) notice of dishonor, (v) demand for payment of any of the Guaranteed Obligations, and (vi) all other notices whatsoever other than as are provided for in this Guaranty.

15. Primary Liability of the Guarantor. The Guarantor agrees that the Government Beneficiary may enforce this Guaranty without the necessity at any time of resorting to or exhausting any other security or collateral. This is a continuing Guaranty of payment and not merely of collection.

16. Term of Guaranty. This Guaranty shall remain in full force and effect until such time as all the Guaranteed Obligations have been discharged or the term of the corporate probation has ended, including but not limited to the Plea Agreements Amount being paid in full and the performance of the Obligors under the ECPs being satisfied, whichever is later.

17. Demand for Payment or Performance: Resolution of Disputes. The Government Beneficiary will provide written notice to the Guarantor if the Obligor defaults under the Plea Agreements. Within ten (10) days of the receipt of a written notice of default from the Government Beneficiary, the Guarantor must transmit to the Government Beneficiary any written objections to the

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notice of default. If the Guarantor fails to object within ten (10) days of the receipt of a written notice of default, it must then pay the amounts owed or, for a default of the guaranty of performance, at its election, retain a qualified third party for the purpose of performing the Guaranteed Obligations or otherwise cause performance of the Guaranteed Obligations. If the Guarantor provides written objections, the Guarantor and the Government Beneficiary shall meet within seven (7) days of the receipt of the written objections by the Government Beneficiary to confer and attempt to resolve the dispute. If the parties are unable to resolve the dispute, within twenty-one (21) days of receipt of the written notice of default, the Guarantor must either institute an action within the United States District Court for the Eastern District of North Carolina or perform the Guaranteed Obligations as requested by the Government Beneficiary.

18. Governing Law. This Guaranty shall be governed by and construed in accordance with federal law and the laws of the State of North Carolina.

19. Jurisdiction. The Guarantor and Obligors agrees to consent to the jurisdiction of the United States District Court for the Eastern District of North Carolina for the purpose of enforcing this Guaranty. The Parties further agree that any dispute or litigation concerning this Guaranty constitutes a related case to the criminal cases identified in the Plea Agreements and that, in the event that litigation is filed in the Eastern District of North Carolina concerning this Guaranty, the filing Party shall designate that action as a related case.

20. Waiver of Jury Trial. The Guarantor and the Government Beneficiary, through acceptance of this Guaranty, waive all rights to trial by jury in any action, proceeding or counterclaim arising or relating to this Guaranty.

21. Entire Agreement; Amendments. Each Party hereto represents and warrants that this Guaranty constitutes a valid and binding agreement enforceable against each Party in accordance with its terms. This Guaranty embodies the entire guaranty agreement between the Parties. This Guaranty supersedes all previous communications, representations or agreements either verbal or written between Guarantor and the Government Beneficiary. This Guaranty integrates all of the terms and conditions mentioned herein or incidental hereto, and supersedes all oral negotiations and prior writings in respect to the subject matter hereof. Subject to Paragraph 5, this Guaranty may only be amended or modified by an instrument in writing signed by each of the Guarantor and the Government Beneficiary.

22. Headings. The headings of the various Sections of this Guaranty are for convenience of reference only and shall not modify, define or limit any of the terms or provisions hereof.

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23. No Third-Party Beneficiary. This Guaranty is given by the Guarantor solely for the benefit of the Government Beneficiary and is not to be relied upon by any other person or entity.

24. Assignment. Neither the Guarantor nor the Government Beneficiary may assign its rights or obligations under this Guaranty to any person or entity without the prior written consent of the other, which consent may not be unreasonably withheld or delayed. Any purported assignment in violation of this paragraph shall be void and without effect. The provisions of this Guaranty shall be binding on the Parties hereto and their successors and assigns. This Guaranty is to continue in full force and effect notwithstanding a change in the composition, ownership or corporate structure of Guarantor.

25. Notices and Service. Any communication, demand or notice to be given hereunder will be duly given when delivered in writing or sent by facsimile to the Guarantor or to the Government Beneficiary, as applicable, at its address as indicated below:

If to the Guarantor, at:

Elliot S. Abrams
Cheshire Parker Schneider & Bryan, PLLC
133 Fayetteville Street, Suite 500
Post Office Box 1029
Raleigh, North 27602
Tel: (919) 833-3114
Cell: (919) 906-2221
Fax: (919) 832-0739

If to the Government Beneficiary, at:

United States Attorney's Office
Eastern District of North Carolina
310 New Bern Avenue, Suite 800
Raleigh, North Carolina 27601-1461
Facsimile No.: (919) 856-4821
Attn.: Chief of Civil Division

Department of Justice
Environmental Crimes Section
Post Office Box 7611
Washington, D.C. 20044
Facsimile No.: (202) 514-8865
Attn.: Case Management Specialist

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or such other address as the Guarantor or the Government Beneficiary shall from time to time specify.

Notice shall be deemed given (a) when received, as evidenced by signed receipt, if sent by hand delivery, overnight courier or registered mail or (b) when received, as evidenced by transmission confirmation report, if sent by facsimile and received on or before 4 pm local time of recipient, or (c) the next business day, as evidenced by transmission confirmation report, if sent by facsimile and received after 4 pm local time of recipient.

The Guarantor hereby appoints Elliot Sol Abrams to act as its authorized agent for service of process under this Guaranty.

26. Representations and Warranties. The Guarantor represents and warrants to the Government Beneficiary as of the date hereof that:

- a) The Guarantor is duly organized, validly existing and in good standing under the laws of the jurisdiction of its incorporation and has full power and legal right to execute and deliver this Guaranty and to perform the provisions of this Guaranty on its part to be performed;
- b) The execution, delivery and performance of this Guaranty by the Guarantor have been and remain duly authorized by all necessary corporate action and do not contravene any provision of its certificate of incorporation or by-laws or any law, regulation or contractual restriction binding on it or its assets;
- c) All consents, authorizations, approvals, registrations and declarations required for the due execution, delivery and performance of this Guaranty have been obtained from or, as the case may be, filed with the relevant governmental authorities having jurisdiction and remain in full force and effect, and all conditions thereof have been duly complied with and no other action by, and no notice to or filing with, any governmental authority having jurisdiction is required for such execution, delivery or performance; and
- d) This Guaranty constitutes the legal, valid and binding obligation of the Guarantor enforceable against it in accordance with its terms, except as enforcement hereof may be limited by applicable bankruptcy, insolvency, reorganization or other similar laws affecting the enforcement of creditors' rights or by general equity principles.

IN WITNESS WHEREOF, the Guarantor has executed this Guaranty as of the day and year first above written.

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CAPT. CHARLIE'S SEAFOOD COMPANY (GUARANTOR)

SO AGREED, THIS _____ DAY OF _____, 2019.

BY:

BY:

PHILLIP R. CARAWAN
President
Capt. Charlie's Seafood, Inc.

TARA FOREMAN
Officer/Employee
Capt. Charlie's Seafood, Inc.

CHARLES E. JAMES, JR.
Counsel for Capt. Charlie's Seafood, Inc.

ELLIOT SOL ABRAMS
Counsel for Capt. Charlie's Seafood, Inc.

Corporate Seal

Corporate Acknowledgment
State of North Carolina

On this ____ day of _____, 2019, before me personally came PHILLIP R. CARAWAN and TARA FOREMAN, to me known who, being duly sworn, did depose and state that (1) he/she resides in _____, (2) is an officer and/or employee of Capt. Charlie's Seafood, Inc. , the corporation described in and which executed the above instrument, (3) he/she knows the seal of such company, (4) the seal affixed to said instrument is such corporate seal, (4) that it was so affixed by order of the Board of Directors of such company, (5) and that he/she signed his/her name thereto by like order.

Notary Public
State of North Carolina
My Commission Expires:

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UNITED STATES GOVERNMENT (GOVERNMENT BENEFICIARY)

SO AGREED, THIS _____ DAY OF _____, 2019.

G. NORMAN ACKER, III
Attorney for the United States
Acting Under Authority Conferred
by 28 U.S.C. § 515

By: _____
BANUMATHI RANGARAJAN
Senior Litigation Counsel
Criminal Division

By: _____
GARY N. DONNER
Trial Attorney
Environmental Crimes Section
U.S. Department of Justice

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EXHIBIT A

United States v. Capt. Neill's Seafood, Inc.
Plea Agreement (without Exhibits)

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EXHIBIT B

United States v. Phillip R. Carawan
Plea Agreement (without Exhibits)

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EXHIBIT C **Consent Judgment**

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EXHIBIT D

Copy of Certified Resolution
Capt. Charlie's Seafood, Inc.